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MODEL LAW ON THE OIL EMBARGO AGAINST SOUTH AFRICA

by

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[*Note*: This paper is published at the request of the Intergovernmental Group to Monitor the Supply and Shipping of Oil and Petroleum Products to South Africa.

A transcript of remarks by legal experts at a meeting of the Intergovernmental Group, held on 31 August 1990 in connection with Professor Lillich's paper on Model Law, is included in the annex.

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The views expressed in this issue are those of the author.]

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PREFACE

The General Assembly has repeatedly called for legislative and other measures to be adopted by all States in order to give effect to their policies concerning measures aimed at applying pressure on South Africa towards the elimination of apartheid. In the case of the oil embargo against South Africa, the issue has been the subject of General Assembly resolutions since 1975. Since its creation in 1986, the Intergovernmental Group to Monitor the Supply and Shipping of Oil and Petroleum Products to South Africa has paid particular attention to this matter and has recommended to the General Assembly that it call upon States to adopt measures for the effective implementation of the oil embargo. In 1987 and 1988, the Intergovernmental Group requested Member States to submit to it their legislative or other comparative measures concerning the implementation of the oil embargo.

In addition, the Intergovernmental Group sought the expertise of legal academicians in the United States of America to assist in the drafting of a proposed model law on the oil embargo. This draft model law was considered by the Intergovernmental Group in 1990. Attached is the synopsis of the discussion as well as the proposed model law, including an explanatory note.

The General Assembly, in its most recent resolution on the oil embargo (resolution 45/176 F of 19 December 1990), commended the proposed model law to States for their attention, including consideration of the adoption of its general principles within the context and framework of their own legal practices.

This publication seeks to assist all States in developing appropriate legislation to ensure the effective implementation of the oil embargo against South Africa and to contribute to the efforts of the United Nations to bring about the speedy end of apartheid through the application of appropriate measures.

READEX FICHE

INTRODUCTION

1. More than a dozen years have passed since the General Assembly, in its resolution 32/105 G of 14 December 1977, first called upon Member States to "impose an embargo on the supply of petroleum and petroleum products to South Africa and on investment in the petroleum industry in South Africa". Since this oil embargo was intended to be and still remains voluntary in nature, its effectiveness depends almost entirely on the willingness of the individual Member States to adopt and enforce national measures aimed at cutting off oil to South Africa.

2. The establishment of the Intergovernmental Group to Monitor the Supply and Shipping of Oil and Petroleum Products to South Africa by the General Assembly in its resolution 41/35 F of 10 November 1986, a step that has been called "an unprecedented move for a non-mandatory embargo",[1/] represented the first serious attempt on the part of the States Members of the United Nations to put teeth in what previously had been essentially a toothless oil embargo. While it may be true that, at least until recently, "the voluntary oil embargo imposed in numerous General Assembly resolutions does not appear to have been widely observed",[1/] the Intergovernmental Group has devised and put in train an ambitious programme not only to encourage States to adopt measures that would make the embargo substantially more effective, but also to spotlight alleged violations and thus encourage States to take remedial action.

3. The programme of action adopted by the Intergovernmental Group is multifaceted but has two principal components. First, the Group has addressed a questionnaire to all Member and non-member States asking for information about, *inter alia*, "the measures, including legislative, technical and administrative, taken by your Government to prevent oil and shipping companies, whether national of your State or foreign, operating in your country from supplying and/or shipping oil and petroleum products to South Africa".[2/] Replies received from Governments are included in annexes to the Group's first[3/] and second[4/] reports.

4. Second, the Intergovernmental Group has undertaken to publish information it receives, primarily from non-governmental organizations (NGOs), about cases of alleged violations of the oil embargo. This information, along with the communications received by the Group from Governments in response to its notifying them of such allegations, has been included in the annexes to the first, second and third[5/] reports.

5. Excellent as these first initiatives by the Inter-governmental Group were, they are obviously only a beginning. In 1989, a Panel of Eminent Persons convened by the United Nations Centre on Transnational Corporations held hearings and heard "a

considerable amount of evidence to the effect that the piecemeal sanctions which have been imposed on South Africa over the last few years are highly susceptible to circumvention".[6] Rejecting the thesis that this data constituted an argument against the imposition of sanctions, the Panel concluded instead that "more efforts ought to be made to close loopholes and to administer and monitor sanctions programmes more effectively".[6]

6. Actually, the Intergovernmental Group was already well along in implementing what the Panel later recommended. It had itself recommended in its first report that Member States should "adopt legislative or comparable measures to impose an embargo on the supply and shipping of oil and petroleum products to South Africa",[7] a recommendation that it reiterated in its second report[8] while adding another one that went considerably further, namely, "to enact laws specifically identifying the conveyance of oil and petroleum products to South Africa, or any assistance or cooperation therein, as a punishable offence in terms of the country's penal law".[9] It also established a Task Force to plan hearings on the oil embargo, with a principal objective of the hearings being a review of the legislative and administrative measures adopted by Governments to enforce the embargo and their effectiveness.[10]

7. Hearings were held in New York on 12 and 13 April 1989 before a special panel at United Nations Headquarters. The gist of the testimony concerning the topic of this report is summarized succinctly in the Intergovernmental Group's third report:

> "20. There was repeated testimony to the effect that legislative measures adopted were inadequate in certain countries and non-existent in others. Several major oil exporting States that banned exports of oil to South Africa had not enacted coherent legal statutes to that effect. One witness proposed that the Intergovernmental Group consider framing a model law on the subject. Another major loophole that was mentioned by several witnesses was that national measures against oil supplies to South Africa were not extended to offshore facilities or to third-country subsidiaries. In regard to the *Almare Terza* case, it was stated that oil embargo legislation in the exporting country provided no effective restrictions on third-party shipments of oil to South Africa. One witness specifically recommended that the General Assembly's appeal to States to prohibit oil supplies to South Africa should be extended to include foreign subsidiaries of companies based in those jurisdictions."[11]

Upon the completion of the hearings, the Panel filed a report urging all States, particularly oil exporting, shipping and handling States, to adopt legislative or other measures to impose an effective oil embargo against South Africa.[12/]

8. At the end of the hearings, the Chairman of the Intergovernmental Group, not only committed the Group to expediting the enactment of such legislative and other measures (and their compilation), but "also stated that those laws, regulations and measures would be analysed in order to assist in the formulation of a model law that would be presented to Governments for their consideration. The Group will report on the model law to the General Assembly at its forty-fifth session".[13/] It is for the purpose of assisting the Group in its drafting of such a model law that the present study has been undertaken.

I. HISTORY AND LEGAL STATUS OF OTHER UNITED NATIONS SANCTIONS AGAINST SOUTH AFRICA

9. In addition to the non-mandatory oil embargo, a number of other United Nations sanctions[14/] have been taken against South Africa over the past 27 years. Before describing the history and addressing the legal status of these sanctions, a brief summary of the provisions of the Charter of the United Nations relevant to sanctions and the respective roles of the General Assembly and the Security Council in their promulgation is in order.

10. While the General Assembly has broad powers to discuss almost any topic (Article 10) and to make recommendations thereon to Member States or to the Security Council (Article 11, paras. 2 and 14), leaving aside questions of budget and membership, it cannot make decisions or take action binding on all Member States. Accordingly, the many resolutions that it has adopted over the past four decades concerning South Africa undoubtedly have had substantial effect on world public opinion, but they have imposed no legal obligation on any Member State *per se*. Article 25 of the Charter, obligating Members to accept and carry out United Nations decisions, applies only to decisions of the Security Council.[15/]

11. The Security Council, like the General Assembly, can make recommendations, and it can adopt resolutions not amounting to decisions that are binding under Article 25. Thus, Chapter VI of the Charter, dealing with the peaceful settlement of disputes, authorizes the Security Council to "call upon" the parties (Article 33), to "investigate" (Article 34), to "recommend appropriate procedures or methods of adjustment" (Article 36) and to "make recommendations to the parties" (Article 38). Since none of these steps are decisions of the Security Council, they

also impose no legal obligation on Member States under Article 25.

12. Under Chapter VII of the Charter, which refers solely to the powers of the Security Council, the Council is authorized to take certain action if it determines the existence of a "threat to peace, breach of the peace, or act of aggression". This action may take the form of either a recommendation or decision, and may include measures not involving the use of force (Article 41) or measures that contemplate the use of force (Article 42). In either instance, once again only decisions of the Security Council impose legal obligations on Member States under Article 25.

13. In the case of South Africa, the Security Council has adopted resolutions over the years containing both recommendations and decisions, the first type voluntary in nature, the second category obligatory on States. Initially, the Council voted in 1963 for a voluntary arms embargo against South Africa.[16/] Efforts to make this limited arms embargo mandatory or to extend its reach provoked a series of triple vetoes by the United Kingdom of Great Britain and Northern Ireland, the United States of America and France for over a decade. By late 1977, however, the situation in South Africa had deteriorated to such an extent that all three of these permanent members of the Council reversed their previous positions and voted for a mandatory arms embargo.[17/] Resolution 418 (1977) specifically invokes Chapter VII, determines that the policies and acts of the South African Government are a threat to peace and security, and decides, *inter alia*, that "all States shall cease forthwith any provisions to South Africa of arms and related *matériel* of all types". Clearly this resolution, the only decision that the Security Council has taken with respect to sanctions against South Africa, is legally binding on Member States pursuant to Article 25.[18/]

14. Both before and after the adoption of resolution 418 (1977), the United Kingdom, the United States and usually France vetoed proposed resolutions mandating wider sanctions against South Africa. Perhaps the most dramatic (and ironic) veto came in February 1987, when the non-aligned members of the Security Council introduced a draft resolution[19/] that would have imposed mandatory economic sanctions similar to the ones contained in the then recently passed United States Comprehensive Anti-Apartheid Act of 1986.[20/] The draft resolution purposely did not go beyond those measures already contained in the United States law, including, it should be noted, a prohibition of the export of crude oil or refined petroleum products,[21/] yet the United States, along with the United Kingdom and the Federal Republic of Germany,[22/] voted against it (France and Japan abstained).

15. A recent interesting development is worth mention, namely, the adoption by the Security Council of several resolutions urging Member States to take certain "voluntary measures" against South Africa. The first such resolution, in 1985, was aimed at ending South Africa's illegal occupation of Namibia.[23/] The second such resolution, in the same year, was directed at ending the apartheid system within South Africa itself.[24/] It included a strong package of voluntary economic measures that Member States were urged to adopt; conspicuously missing, however, was the recommendation that States prohibit the export of oil and petroleum products. Both these resolutions were adopted by 13 votes to none, with the United Kingdom and the United States abstaining. A third resolution along similar voluntary lines was adopted in 1986 clarifying (and perhaps extending) the 1977 mandatory arms embargo.[25/] While these resolutions are not legally binding on Member States, like their General Assembly counterparts they arguably carry great moral weight and may presage the eventual adoption by the Security Council of limited or even comprehensive mandatory economic sanctions against South Africa.

16. Finally, as mentioned in paragraphs 1 and 2 above, for more than a dozen years the General Assembly has called upon States to prohibit on a voluntary basis, the export, handling and shipping of oil and petroleum products to South Africa. Since, unlike decisions of the Security Council taken under Chapter VII, the resolutions establishing the oil embargo and the Inter-governmental Group to monitor it are not legally binding upon Member States under Article 25 of the Charter, the legal status of oil embargo under international law is not particularly strong. Yet, in reality, it is only as weak as the States Members of the United Nations wish it to be, for the authorizing General Assembly resolutions clearly contemplate that Member States will take action to make violations of the embargo illegal under national law. From this perspective, the limited effectiveness of the voluntary oil embargo obviously is not the fault of the United Nations. In any event, any proposal that seeks to improve its effectiveness must begin with an examination of how Member States have (or have not) acted with respect to its promulgation and enforcement.[26/]

II. REASONS FOR THE LIMITED EFFECTIVENESS OF A VOLUNTARY OIL EMBARGO

17. The success of the Intergovernmental Group's mission depends in large measure on its ability to convince States Members of the United Nations to convert what on the international level is a voluntary oil embargo into a binding legal obligation on the national level. Ideally, that would entail all States enacting laws or promulgating executive decrees or administrative regulations duplicating, or at least closely tracking, the

regulations duplicating, or at least closely tracking, the prohibitory provisions found in the various General Assembly resolutions establishing and expanding the oil embargo (see paras. 1, 2 and 16 above).

18. As summarized by the United Nations Centre on Transnational Corporations,[27] these resolutions cumulatively call upon all Governments:

(a) To refrain from and prohibit the sale or supply of petroleum and petroleum products to South Africa or Namibia[28] or to any person or entity in those territories;

(b) To prohibit any activities by their nationals, companies of their nationality, or in their territory that promote the sale or supply of petroleum and petroleum products to South Africa or Namibia, including the transportation to South Africa or Namibia of all crude oil or oil products, wherever they originate;

(c) To prohibit investments in or supply of equipment, services or technology to the petroleum industry in South Africa or Namibia, including exploration, storage, refining, transport or distribution;

(d) To establish and enforce "end-user" requirements to stop the supply of petroleum or petroleum products to South Africa or Namibia directly or through third parties;

(e) To prohibit the provision of facilities in or the use of their ports or airports to vessels or aircraft carrying petroleum or petroleum products to South Africa or Namibia;

(f) To prohibit any assistance to South Africa - through finance, technology, equipment or personnel - in the construction or operation of oil-from-coal plants, and the importation of oil-from-coal technology by South Africa;

(g) To prohibit South African nationals or corporate interests from acquiring, maintaining or expanding any holdings or interests in oil companies or properties in their territories;

(h) To take effective actions against individuals, corporations or tanker companies involved in the illicit supply of petroleum or petroleum products to South Africa - including penal action and the seizures of tankers or vessels owned by their nationals or companies of their nationality that are used to transport petroleum or petroleum products to South Africa or Namibia;

(i) To establish strict control over the supply of oil and oil products to South Africa and Namibia through intermediaries,

oil companies and traders by placing the responsibility for the fulfilment of the contract on the first buyer or seller who would be liable for the actions of these parties;

(j) To prevent access by South Africa to other sources of energy, including raw materials, technical know-how, financial assistance and transport;

(k) To terminate the transport of oil to South Africa by ships flying their flags or by ships that are ultimately owned, managed or chartered by their national or by companies within their jurisdiction;

(l) To develop a system of registration of ships, registered or owned by their nationals, that had unloaded oil in South Africa or Namibia.

19. Moreover, they specifically request oil-exporting States:

(a) To require that companies purchasing petroleum do not send the oil to South Africa; that the oil is delivered in its entirety to the final party specified in the contract of sale; and that the purchaser does not itself permit re-exportation of the oil to South Africa;

(b) To require companies purchasing petroleum to obtain and show documentary proof that the cargo is delivered to the port specified in the contract of sale;

(c) To take effective action against oil and shipping companies that violate the above policies, by refusing - on a temporary or long-term basis - to supply them with further oil.[29/]

20. In view of the evolving nature of the oil embargo and the limited resources at its disposal, the Intergovernmental Group, in its monitoring of the laws of Member States that purport to implement the embargo, has not attempted to cover the legal waterfront. Instead, it has prudently kept its focus on those legal measures that States have taken to prevent oil and shipping companies from supplying or shipping oil or petroleum products to South Africa.[30/] This approach, of necessity, defines the parameters of this section's survey of the inadequacies and loopholes in existing laws and decrees of Member States that, as noted above, contribute significantly to the limited effectiveness of the oil embargo.[31/]

21. Pending the Intergovernmental Group's comprehensive study of the legal measures that States have taken pursuant to national law to enforce the oil embargo,[32/] one must look to its first two reports[33/] and to other sources[34/] for legal data. To date, it would appear that only 65 of the 160 States Members of the United Nations (approximately 40 per cent) have responded to the

Intergovernmental Group's requests for information[35/]. Their replies - rarely fulsome, often opaque and occasionally disingenuous - reveal a pattern of inconsistent and patchwork prohibition in their laws that clearly preclude and generally severely hamper effective enforcement of the oil embargo. Although the data is so unreliable that generalizations are hazardous, from a cursory survey of the legal measures that States have (or have not) taken several major problems stand out.

22. First, approximately one third of the States replying acknowledge that they have not taken legal steps to implement the oil embargo and, moreover, have no present intention of doing so. Most of these States have adopted the position that, since they are not oil producers, such measures are unnecessary. Hence, the Bahamas replied that it "is not a producer or major exporter of oil. Its involvement in the international trade in oil is limited to importation for local consumption and a small refining and export facility. It has not, therefore, enacted legislation nor initiated technical or administrative measures with respect to the prevention of the supply and shipping of oil and petroleum products to South Africa".[4/] Other States in this category actually may be oil producers but justify their failure to act on one of two grounds: either they simply declare, as Zaire does, that since it does not export any petroleum products to South Africa, its laws do not as yet include any provisions on the matter,[36/] or, like Canada, they cite the existence of a voluntary ban on the sale of crude oil and petroleum products, noting that "Canadian companies were asked not to enter into any contracts for the sale and export of these goods to South Africa".[3/] The main point in all these instances, of course, is that the States involved have no national legal measures in place to deter violations of the oil embargo.

23. Second, slightly less than one third of the States replying, while also acknowledging that they have not enacted special legal measures to implement the oil embargo, maintain that they are in compliance either through application of a previously adopted general trade embargo against South Africa, or through use of export controls authorized and applied pursuant to the State's laws governing foreign trade. Thus, Yugoslavia pointed out that it carried out "a complete and comprehensive boycott" of South Africa, and that its legislation "fully relates to trade in oil and petroleum products".[3/] Argentina, on the other hand, apparently has not adopted any special legislation, but "carefully monitors compliance with the oil embargo against South Africa, using machinery associated with the purchase and sale of foreign exchange and the levying of import and export duty to prevent any violation".[3/] It is difficult to judge the effectiveness of such national approaches without more detailed information about the respective laws and regulations involved and whether and how they are enforced.

24. Third, the States that have implemented the oil embargo, either under the approaches described in the above paragraph or, in a handful of instances, through the enactment of special oil sanctions legislation, frequently appear reluctant to extend such measures to the full extent called for by the General Assembly in the various resolutions that collectively constitute the oil embargo.[37] This criticism applies even to the two core provisions in the resolutions, namely, that the export of "oil or petroleum products" be banned, and that the ban apply to both the "supply and shipping" of them.

25. The ban of the States members of the European Economic Community (EEC) on oil exports to South Africa, often cited by EEC States to demonstrate their compliance with the United Nations' oil embargo,[38] is a prime example of the failure of an implementing measure to match the United Nations prohibition. This failure is described in a recent report by the United Nations Secretary-General:

> "The EEC foreign ministers on 10 September 1985 decided to recommend a prohibition on the export of EEC-produced oil to South Africa.... On 31 January 1986, the ban was expanded to include non-EEC-produced crude oil, although not oil in bonded warehouses on EEC territory. Neither measure prohibited the export of refined products."[39]

Thus even today crude oil in bonded storage may be exported from EEC States to South Africa, and it is unlikely that more than half of these States prohibit the export of petroleum products.[40] A few other States - Australia,[3] Brazil[39] Israel,[4] and Singapore[41] are examples, have specifically banned the export of petroleum products. Moreover, other States may well do so as part of a general trade embargo against South Africa or through the use of export controls. Nevertheless, the vast majority of States Members of the United Nations seemingly permit the sale and shipment of petroleum products to South Africa. As the Intergovernmental Group noted in its interim report to the General Assembly at its forth-fourth session, "the failure to include petroleum products in export bans thus remains a loophole in the oil embargo against South Africa".[42]

26. The second core provision in the General Assembly resolutions prohibiting the shipment, rather than just the sale, of oil and petroleum products is rarely replicated in national legal measures. In early resolutions, the Assembly requested all States to enact legislation prohibiting "the shipment in vessels or aircraft of their registration, or under charter to their nationals, of any petroleum or petroleum products to South Africa",[43] with one resolution even urging them to seize "tankers owned by their nationals or registered in their countries which are used to transport oil or oil products to South Africa".[44] In

more recent resolutions, the Assembly requested States "to terminate the transport of oil to South Africa by ships flying their flags, or by ships that are ultimately owned, managed or chartered by their nationals or by companies within their jurisdiction".[45/]

27. The extension of the oil embargo to cover oil-shipping as well as oil-exporting activities was intended to compensate for a major shortcoming of the original embargo: "the assumption that controlling exports from exporting countries would suffice".[46/] This assumption early on proved unfounded. The April 1989 hearings were advised that:

> "Not only are there intermediary countries with spot markets and oil-handling facilities, but South Africa has also been known to purchase oil in oil-importing harbours and to export it from there. The original embargo strategy had been too narrowly focused on oil-exporting countries and the creation of the Intergovernmental Group to Monitor the Supply and Shipping of Oil and Petroleum Products to South Africa had been based on the realization that oil-shipping countries would have to be included in attempts to strengthen the embargo."[46/]

Indeed, in its last two reports the Intergovernmental Group has recommended that States "enact laws specifically identifying the conveyance of oil and petroleum products to South Africa, or any assistance or cooperation therein, as a punishable offence in terms of the country's penal law, and publicize cases of successful prosecution in conformity with their national laws".[4/5/]

28. The response to this appeal, to say the least, has been weak. Available data reveals that Denmark, one of the relatively few States to enact special legislation banning trade with South Africa, applies it to the "transport of mineral oil and mineral oil products on Danish vessels to and from South Africa".[3/47/] Norway's special legislation, which covers crude oil shipments on Norwegian ships, goes beyond Denmark's in prohibiting such carriage by "anyone domiciled or resident in Norway or any legal person registered in Norway who, by charter, proprietary shares or in any other way, manages or has at his disposal a ship under a foreign flag".[3/] Sweden's special legislation, on the other hand, somewhat opaquely provides that "the loading, unloading, transportation or reception for storage of [oil or petroleum products] or the provision of means of transport or of transport equipment or supplies" for such purposes are prohibited. Most recently, Singapore on 15 September 1989 adopted an administrative ban on the carriage of oil to South Africa by Singapore-flagged ships. Most States, however, have not heeded the call of the Intergovernmental Group, although few are as frank as Australia, whose response to the Group's questionnaire

called attention to the fact that Australia's "complete ban on the sale of oil to South Africa" does not prevent "the use of Australian registered vessels or aircraft, or those owned by Australian companies". In sum, then, the second core prohibition needed to assure the eventual success of the oil embargo has not found its way into national law to any significant extent. Another loophole thus needs to be closed.

29. A fourth major problem, and one not sufficiently perceived, arises from the fact that in most cases the legal measures that States have adopted to implement the oil embargo are silent as to the actors (as distinguished from the acts) they cover. In the case of the laws discussed in the previous paragraph, Denmark's applies to "Danish-owned ships", Singapore's to "Singapore-flagged ships", and Norway's not only to Norwegian ships but also to foreign-flag ships owned or controlled by "anyone domiciled or resident in Norway". These undefined phrases reflect assertions of jurisdiction by the States involved under the well-established international law principles of nationality and territoriality.[48/] Whether they go far enough in asserting jurisdiction over individuals and corporations who may be breaking the oil embargo, however, is doubtful. Moreover, it must be remembered that few States have adopted special legislation, and that the reach of the legal measures taken by other States under general trade embargoes or by use of export controls is unknown. Thus, serious gaps in coverage exist that enable individuals and corporations to flaunt the oil embargo with impunity. The Intergovernmental Group has not paid sufficient attention to this major problem so far; as will be shown in paragraphs 40-45 below, efforts to draft a model law will have to address it.

30. The fifth (and for present purposes final) problem with respect to the legal measures that States have adopted to enforce the oil embargo is that they lack sufficient deterrent strength to be taken seriously. The Intergovernmental Group, following the lead of the General Assembly, which has repeatedly urged Member States "to impose penal action against companies and individuals that have been involved in violating the oil embargo",[45/] has acknowledged the importance of making violations of the oil embargo a criminal offence under national laws (see para. 27 above).[4/] As stated in its second report,[4/] violations should be clearly defined in municipal legislation as punishable offenses under the statutes of penal law and not merely as tortious breaches of contractual agreements in civil law. The supply and shipping of oil and petroleum products to South Africa should be "clearly prohibited in international [national?] law and should be punishable". In addition to creating an added deterrent to the violators themselves, such measures also could create a basis for various types of intervention by third parties.

31. A survey of State responses to the Intergovernmental Group's questionnaires does little to convince one that even a substantial minority have made the export or shipping of oil or petroleum products to South Africa a criminal office.[49] True, the Islamic Republic of Iran places oil embargo violators on its "black list",[50] Kuwait "refrains from dealing" with them in the future[51]; and Indonesia advises that unspecified "sanctions have been and will be imposed" on them.[52] Furthermore, Singapore has stated that Singapore-flagged ships violating the oil embargo are liable to have their registrations cancelled,[53] while Norway authorizes the confiscation of illegally exported oil "by court judgement irrespective of ownership...".[3] Yet none of these penalties are penal in nature. Indeed, only Norway (fine or maximum term of three years' imprisonment or both)[3] and Denmark (fine or "mitigated" imprisonment)[3] specifically make the violation of their respective oil embargo acts a criminal offence. Thus, the Intergovernmental Group is largely correct when it concludes that "few countries consider the violation of the oil embargo to be a criminal offence. The prohibitions applied by most States do not seem to go beyond the bounds of civil law and in cases of violations they only give rise to a possible tort action by the offended party, but not to criminal prosecution of the offender. With respect to civil action, no Government has so far volunteered information concerning penalties imposed on the violators of the oil embargo.[54] The absence of the criminal sanction, therefore, is undoubtedly a major factor in undermining the effectiveness of national efforts to implement the United Nations voluntary oil embargo against South Africa.

III. SCOPE, REACH AND MAJOR PROVISIONS OF MODEL LAW

32. The General Assembly has urged Member States "to adopt effective measures and/or legislation to broaden the scope of the oil embargo in order to ensure the complete cessation of the supply and shipping of oil and petroleum products to South Africa...".[32] The Intergovernmental Group has endorsed this recommendation in all three of its reports (see para. 6 above), and within the past year decided to formulate "a model law that would be presented to Governments for their consideration" and possible adoption (see para. 8 above). In view of the manifest gaps and loopholes in the present national legal regimes that have been revealed by the previous section's very preliminary survey of state laws, regulations and measures designed to provide some teeth for the United Nations voluntary oil embargo against South Africa, what should be the scope, reach and major provisions of such a law? These questions will be addressed in the present section; the text of a proposed model law is set out in the annex to the present report.

33. Before taking up specific provisions, many of them obvious responses to the inadequate (or even nonexistent) national legal regimes discussed in the previous section, the importance of having all States enact a South African oil embargo law should be underscored. Voluntary bans and "gentlemen's agreements" are no guarantee that oil sales and shipments to South Africa will cease. Nor will laws enacted by oil-exporting or even oil-shipping or oil-handling States be enough to stop the flow. As long as there are States without laws prohibiting their nationals - both individuals and corporations - from participating in the oil trade, the potential for profit exists and deals will be made.[55/] The oil embargo depends for its success on enforcement by Member States on the national level, and that enforcement process, like the proverbial chain, is only as strong as its weakest link. Thus, it is imperative that most if not all States be persuaded to enact legislation based upon, or closely tracking, the proposed model law.

34. Enactment of such a law would have other salutary benefits, even for States that currently purport to adhere to the voluntary oil embargo pursuant to a general trade embargo or the use of export controls. The first and perhaps most important benefit would be symbolic. States enacting the model law would acknowledge their commitment to making the oil embargo both comprehensive and effective on the international level. A second benefit would come from the fact that by enacting special legislation States would underscore the importance of the oil embargo on the national level and presumably adopt more effective means of enforcing it. How any embargo is interpreted and applied on the national level certainly determines in large measures its success or failure. Thus, a recent report of the United Nations Centre on Transnational Corporations observed that:

> "An important difficulty in the implementation of national measures relates to the administration of such measures which is often in the hands of various ministries, some of which may be less sensitive to the implications of the embargo. The tendency to equate sanction measures with customs regulations has a number of negative implications for their international coordination and enforcement. Penalties tend to be less stringent than those imposed for other trade violations and cooperation among custom authorities is usually not well-developed. The territorial scope of such regulations tends to be limited. This may account in part for the fact that many measures have been construed as not applying to free ports, free trade zones, bonded warehouses and other areas which, by definition, fall outside the customs jurisdiction."[56/]

Such restrictive interpretations need not occur if the oil embargo has the status of special legislation.

35. Turning now to the scope of the model law, rather than attempting to proscribe all the activities condemned in the various General Assembly resolutions establishing and expanding the oil embargo (see paras. 18 and 19 above), prudence dictates concentrating at present on provisions designed to prevent oil and shipping companies from supplying or shipping oil or petroleum products to South Africa.[57/] Indeed, in view of the reluctance of most States to adopt national legal measures even in this more limited area, persuading States to adopt a law along such lines is hardly a modest undertaking.

36. First and foremost, the model law must adopt the General Assembly's repeated call and prohibit the export of both oil and petroleum products. The long-term success of the oil embargo turns upon the willingness of States to take legal measures to close this major loophole that threatens to undercut the entire oil sanctions effort. Of all the oil that South Africa imports, 20 per cent comes in the form of petroleum products, and cutting off "the petroleum product trade with South Africa would create a supply gap which could not easily be replaced by the authorities of Pretoria."[58/] A case can be made, too, for spelling out in the model law just what items fall within the phrase "petroleum products", since even the exact range of products covered by a ban on exports of petroleum products may differ from one country to another.[59/] On balance, however, defining the phrase probably would create more problems than it would solve, since there is no consensus as to its meaning and, were one agreed upon, it might enable potential violators to take advantage of the old maxim *inclusio unius est exclusio alterius*[60/] to circumvent the basic thrust of the law. Thus a definition is not recommended now, although one might be considered in future years.

37. Second, the prohibition against exporting oil and petroleum products must clearly cover their export from anywhere within the territorial jurisdiction of the exporting State, including bonded storage, free ports, free zones and other offshore facilities.[61/] Since such facilities are nothing more than "import conduit mechanisms in the evasion of sanctions",[62/] the model law should be drafted to cover them explicitly. While a State may purposely put offshore facilities outside its national customs control zone, they still remain within the state's territory and hence should be subject to the overriding provisions of the model law. Ensuring that it applies to the sale of oil in bonded storage in such harbours as Rotterdam would contribute greatly to the effectiveness of the oil embargo.

38. Third, the normal practice of oil exporters of including "end user" clauses in their sales contracts, whereby the buyer is obligated not to resell or permit the resale of the oil to South

ultimate disposition of the exported oil. Codifying these practices would heighten the interest of exporting States in overseeing compliance with them. Moreover, it would subject violators to serious criminal sanctions rather than merely the uncertain and uneven responses that violations provoke today (see para. 31). Since no oil exporting State permits the sale or resale of oil to South Africa, "all crude oil reaching South Africa must have changed hands illegally somewhere along the route".[62] Mandating by law the use and enforcement of "end user" clauses and "discharge certificates" would contribute to the increased detection of such illegal transactions and the subsequent punishment of sanctions violators.

39. Fourth, the model law should respect General Assembly resolutions (see para. 26) and Intergovernmental Group requests[63] and prohibit not only the export of oil and petroleum products, but also their shipment and, indeed, any other aspect of what may be called oil-handling (trading, transshipping and refining) whenever South Africa is concerned. To date, only a handful of oil-shipping States have enacted special legislation prohibiting their ships from conveying oil and petroleum products to South Africa (see para. 28), and none apparently have taken legal steps to prohibit individuals or corporations from otherwise participating in the oil-to-South Africa process. Clearly, to achieve maximum effectiveness the model law must cover not only oil exporting and oil shipping, but also all other activities that aid and abet the supply of oil and petroleum products to South Africa.[64]

40. Fifth, the model law, in addition to proscribing all the activities mentioned in the above paragraph, should contain a detailed definition of the persons, natural and juridical, subject to the law's prohibitions. Both individuals and corporations are entitled to know, with reasonable certainty, when the law applies to them. In addition, the Intergovernmental Group is entitled to expect that States adopt legal measures that avoid gaps and loopholes and thus assure the optimal effectiveness of the oil embargo. The international law principle of nationality permits States to adopt rules governing the conduct of their nationals, whether individuals or corporations, wherever that conduct takes place.[65] The international law principle of territoriality allows States to adopt rules governing conduct that, wholly or in substantial part, takes place within their territory.[66] Combined, these two principles enable States to reach a wide range of actors whose conduct may run afoul of the substantive provisions recommended for inclusion in the proposed model law.

41. Very little data is available on the extent to which States, in their efforts to enforce the oil embargo, have asserted jurisdiction over individuals and corporations pursuant to national legal measures (see para. 29). However, a "major

loophole" mentioned by several witnesses at the April 1989 hearings on the oil embargo against South Africa is the non-application of sanctions to the foreign subsidiaries of corporations based in many Member States (see para. 17). While one State, Sweden, has applied its law prohibiting investments in South Africa to the foreign subsidiaries of Swedish corporations,[67/] its most recent law prohibiting trade with South Africa does not do so. The United States, under section 321 of the Comprehensive Anti-Apartheid Act of 1986,[21/] prohibits the export of crude oil and petroleum products to South Africa, but implementing regulations of the Commerce Department[68/] exclude by implication the foreign subsidiaries of United States corporations.[69/] The law of other States on the coverage of foreign subsidiaries is not known.

42. While "extraterritorial" assertions of jurisdiction, especially on the part of the United States, have proved controversial in recent years,[70/] jurisdiction over most persons engaged in acts proscribed by the model law can be obtained through ordinary applications of the traditional international law principles of nationality and territoriality. Indeed, the Security Council Committee established in pursuance of resolution 253 (1968) concerning Southern Rhodesia, which monitored the Southern Rhodesian sanctions programme, continuously prodded States to take jurisdiction over sanctions violators to the maximum extent permitted by international law. In many cases where the Sanctions Committee draw the attention of Member States to suspected violations, the latter replied that they could take no action against the corporations involved, despite the fact that they were registered in the country or operating from it.

43. The Committee therefore requested the advice of the United Nations Legal Counsel, key portions of whose opinion is set out in the following paragraph:

> "The Government first comments that its authorities have no legal or practical means of intervening outside its own territory. This seems to me to deal only partially with the means available to the authorities concerned to influence the companies in question. If those companies are organized under the law of the State concerned, have its nationality and are registered under its law, it would appear to be open to the competent authorities to decide whether or not to allow the companies to maintain whatever status they enjoy under local law. It would, for example, seem that the authorities may be in a position to require that the companies concerned desist from engaging in the transactions in question as a condition of the continuance of their registration under local law.

engaging in the transactions in question as a condition of the continuance of their registration under local law.

"In the second place, the Government comments that under public international law, each State is entitled to apply legal norms only in its own territory, and that its authorities cannot therefore take steps which would contravene positive international law. To the extent that this remark is to the effect that a State may only enforce its national legislation within its own territory, it is no doubt correct. However, it would be at variance with both law and precedent, to assert that public international law precludes a State from enacting laws having extraterritorial effect and providing for enforcement within the territory of the legislating State.

"With regard to the law reference is made to a pertinent passage in the Judgment of Permanent Court of International Justice in the case of the SS Lotus:

> "'Now the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.
>
> "'It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that

> States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.'[71/]

> "With regard to precedent, the United Kingdom Trading with the Enemy Act of 1939 (2 and 3 Geo 6 (c) 89), the United States Trading with the Enemy Act (40 USCA), and more recently, the United Kingdom-Southern Rhodesia (Petroleum) Order of 1965 (ST/1965 No. 2140), and the Southern Rhodesia (Prohibitive Export and Import) Order of 1966 (SI/1966 No. 41) all provide clear examples of national legislation controlling the activities of nationals and legal persons not only at home but also abroad and providing for enforcement at home of penalties in respect of contraventions by them abroad without such legislation being regarded as in conflict with public international law."[72/]

44. Although the Sanctions Committee never clarified in practice whether it thought the Legal Counsel's opinion endorsed *sub silentio* the right of States to apply national legal measures, taken pursuant to United Nations authorization, on an extraterritorial basis to the activities of foreign subsidiaries of their corporations, such an interpretation is not unreasonable.[73/] Moreover, the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States, while accepting that "a State may not ordinarily regulate activities of corporations organized under the laws of a foreign State on the basis that they are owned or controlled by nationals of the regulating State," recognizes that "it may not be unreasonable for a State to exercise jurisdiction for limited purposes with respect to activities of affiliated foreign entities...."[74/]

45. Asserting extraterritorial jurisdiction to enforce sanctions recommended by the United Nations General Assembly would seem to be a classic case where such jurisdictional claims should be honoured, especially when the purpose of the oil embargo at issue is to displace an apartheid regime condemned by the United Nations and the entire international community. The International Court of Justice, after all, has declared apartheid "a flagrant violation of the purposes and principles of the Charter...".[75/] Moreover, it is a violation of the International Convention on the Elimination of All Forms of Racial Discrimination,[76/] ratified by 129 States as at 1 January 1990, and as at the same date 88 States had made it a criminal offence

under the International Convention on the Suppression and Punishment of the Crime of Apartheid.[77/] Apartheid has also been deemed a crime under article 19 of the International Law Commission's draft articles on State responsibility.[78/] Finally, section 702(f) of the American Law Institute's Restatement (Third)[79/] lists apartheid as not only a violation of the customary international law of human rights, but of a *jus cogens* norm. In view of this unanimous condemnation of apartheid, it is unlikely that any State would object, much less object successfully, to the extraterritorial effect of the law of another State designed to give effect to the United Nations' voluntary oil embargo.[80/] For this reason, it is recommended that the model law contain a provision extending a State's jurisdiction to the foreign subsidiaries of its corporations.

46. Sixth, and last, the model law should heed the repeated urgings of the General Assembly[45/] and the Intergovernmental Group itself (see para. 30) and make "the conveyance of oil and petroleum products to South Africa, or any assistance or cooperation therein, ... a punishable offence in terms of the country's penal law ... ".[81/] Adopting the approach taken in the Norwegian oil embargo legislation, a substantial fine or a prison term, or both, should be the applicable penalty in case of willful violation of the law, while negligent violation should result in a smaller fine and a lesser, if any, prison term.[82/] Guidance as to civil as well as criminal penalties might also be found in section 603 of the United States Comprehensive Anti-Apartheid Act of 1986,[83/] which establishes fines and civil penalties for individual violators ranging from $10,000 to $50,000, or a prison term, or both, and fines of up to $1 million for willful violations by corporations.[84/]

47. At present, few States have specifically made violations of the oil embargo a criminal offence, much less a serious one (see para. 31). Penalties like the ones suggested in the preceding paragraph, plus confiscation of the ships or aircraft engaged in sanctions violations (and their cargoes),[85/] would greatly increase the deterrent effect of the model law. It would also open up the possibility of civil actions brought by third parties in numerous jurisdictions, actions that would heighten the law's deterrent effect and increase South Africa's transactions costs as it continues its clandestine efforts to supply its oil and petroleum product needs.[86/]

IV. INTERGOVERNMENTAL GROUP'S OVERSIGHT OF MODEL LAW

48. The purpose of the model act set out in the annex to the present report is threefold:

(a) To provide a standardized legal instrument that Member States, taking into account their own legal systems, can revise

(b) To establish a benchmark against which the laws, decrees and other legal measures that have been or will be adopted by members to implement the voluntary oil embargo can be measured;

(c) To create a precedent, like the one that has grown up under the Commonwealth system, whereby the United Nations furnishes Member States with legal assistance to facilitate their carrying out the international objectives of the organization.

49. The model law, even if adopted by a substantial number of States, which frankly is highly unlikely, will not cause a marked increase in the effectiveness of the oil embargo overnight. It is but one step, albeit an important one, in the evolving process of applying United Nations sanctions through the use of national laws and procedures. Even with the model law on the books, there is no guarantee that it will be enforced with vigor. As has been observed, "ultimately the political will, or lack of it, of Governments, and not the legal mechanism employed, determines the success or failure of coordinated international embargo measures".[87/] Model laws, or indeed law in general, is no solution to a problem if the enforcement of the legal norms is non-existent or half-hearted.

50. The Intergovernmental Group has the opportunity to play a major role in developing national legal measures to enforce the United Nation's voluntary arms embargo against South Africa. Initially, it can prepare and advocate the adoption of the model law. Then it can follow up, much like the Human Rights Committee does when States report to it under the International Covenant on Civil and Political Rights,[88/] and solicit Member State responses on whether and to what extent they have adopted the model law, as well as what methods they have taken to enforce it. Next, it can utilize its annual reports to the General Assembly to summarize and critique the progress of Member States in adopting and enforcing the model law. Finally, assisted by non-governmental organizations, it can disseminate widely information on violations of the oil embargo and ways and means to prevent violations, together with publicity about the successful prosecution of sanctions violators by Member States pursuant to their national versions of the model law.[89/]

51. Through this use of the model law and other initiatives that it has undertaken or may adopt, the Intergovernmental Group has a unique opportunity to strengthen the United Nations voluntary oil embargo against South Africa and to bring to a peaceful and non-violent end that country's apartheid regime.

Notes

1/ Report of the United Nations Centre on Transnational Corporations, entitled "Sanctions against South Africa", (E/C.10/AC.4/1989/4), p.21.

2/ Official Records of the General Assembly, Forty-second Session, Supplement No. 45 (A/42/45), annex I, para. 1.

3/ Ibid., annex II.

4/ Ibid., Forty-third Session, Supplement No. 44 (A/43/44), annex I.

5/ Ibid., Forty-fourth Session, Supplement No. 44 (A/44/44).

6/ Report and recommendations of the Panel of Eminent Persons established to conduct the second public hearings on the activities of transnational corporations in South Africa and Namibia: Note by the Secretary-General, (A/44/576-S/20867), p.14.

7/ Official Records of the General Assembly, Forty-second Session, Supplement No. 45 (A.42.45), para. 26(a).

8/ Ibid., Forty-third Session, Supplement No. 44 (A/43/44), para. 56(a).

9/ Ibid., para. 56(e).

10/ Ibid., para. 44.

11/ Ibid., Forty-fourth Session, Supplement No. 44 (A/44/44).

12/ A/44/279-S/20634, annex. The Panel also recommended, in this connection, that "the Intergovernmental Group should undertake a study of existing legislations with a view to achieving a greater uniformity...". Presumably such a study is under way. In the Intergovernmental Group's third report, the Chairman of the Group announced "plans for the preparation of an up-to-date compilation of laws and regulations and comparable measures taken by States... [with respect to] the export, shipping and handling of oil and petroleum products to South Africa". (See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 44 (A/44/44), para. 31.)

13/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 44 (A/44/44), para. 32.

14/ The phrase is something of a misnomer, for the reasons set out in note 26 below. The actual word sanctions, of course, is not found in Chapters VI or VII of the Charter of the United Nations. It has commonly been used in the past to denote measures that may be adopted by the Security Council pursuant to Chapter VII, Articles 41 and 42.

15/ Paragraphs 10-12 draw heavily from A. Lowenfeld, Trade Controls for Political Ends, second edition, 1983, pp. 439 and 440.

16/ Security Council resolution 181 (1963).

17/ Security Council resolution 418 (1977).

18/ In its resolution 558 (1984) the Security Council reaffirmed this resolution, at the same time requesting Member States "to refrain from importing arms, ammunition of all types and military vehicles produced in South Africa".

19/ S/18705.

20/ 22 U.S.C., sect. 5001-5116 (1988).

21/ 22 U.S.C., sect. 5071(a) (1988): "No crude oil or refined petroleum product which is subject to the jurisdiction of the United States may be exported to South Africa, and no crude oil or refined petroleum product may be exported to South Africa by a person subject to the jurisdiction of the United States."

22/ Through accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the two German States have united to form one sovereign State. As from the date of unification, the Federal Republic of Germany acts in the United Nations under the designation of "Germany".

23/ Security Council resolution 566 (1985).

24/ Security Council resolution 569 (1985).

25/ Security Council resolution 591 (1986).

26/ Despite the difference in the nature of the legal obligation, the same would hold true even if the oil embargo had been proclaimed by a Security Council decision. Lowenfeld op.cit., p. 452: "Though everyone referred to the economic measures against Rhodesia as United Nations sanctions, in fact the United Nations had no enforcement mechanism ... and no authority to deal with individuals engaged in trade or other economic activity with Rhodesia. The counterpart of the original understanding that the United Nations deals only with States - often deplored in the context of violation of human rights - was

that the United Nations as an organization was wholly dependent on States for implementation of the sanctions programme. What [Security Council] resolution 232 (1966) (and succeeding resolutions) accomplished was to impose an obligation on States - an obligation that they discharged in quite different ways".

27/ E/C.10/AC.4/1989/4, pp. 46 and 47.

28/ Namibia achieved its independence on 21 March 1990 and is no longer subject to the oil embargo.

29/ E/C.10/AC.4/1989/4, p.47.

30/ See the text of the questionnaire addressed to all States referred to in para. 3 above.

31/ It also, by choice, determines the scope of the model law discussed in the next section. See also E/C.10/AC.4/1989/4, p.21.

32/ See text accompanying note 12 supra.

33/ See notes 3 and 4 supra.

34/ Information used in preparing the present section was obtained from the Association of Western European Parliamentarians for Action against Apartheid (AWEPAA), "Implementation of the Oil Embargo by Western Countries", submitted to the Hearings on the Oil Embargo against South Africa in April 1989); Shipping Research Bureau, Newsletter on the Oil Embargo against South Africa, No. 14 (January 1989); and the United Nations Centre against Apartheid.

35/ Some 50 States responded to the Intergovernmental Group's initial request, referred to in its first report; 36 States (29 of the original 50, plus 7 first timers) responded to a follow-up request a year later; 32 States (including 8 first timers) have responded to requests over the past 18 months. Three permanent members of the Security Council - France, the United States and the United Kingdom - are among the 95 Members States of the United Nations that have never responded.

36/ Note that the reply refers only to petroleum products. Quaere: does Zaire's export policy also cover crude oil?

37/ The General Assembly has recognized and attempted to overcome this reluctance by urging Member States, in its resolution 43/50 J, "to adopt effective measures and/or legislation to broaden the scope of the oil embargo in order to ensure the complete cessation of the supply and shipping of oil and petroleum products to South Africa".

38/ The Federal Republic of Germany informed the Intergovernmental Group in August 1989 that it "has enacted no legislative or comparable measures to impose an effective oil embargo against South Africa on a national level. The Federal Government did, however, join in a decision by the Council of Ministers of 10 September 1985 on the cessation of oil exports to South Africa".

39/ A/43/786.

40/ See note 34, AWEPAA paper, p.3, listing Belgium, Denmark, France, Ireland, Italy and Spain.

41/ In September 1989, Singapore informed the Intergovernmental Group that it had adopted an administrative ban on the export of oil and petroleum products to South Africa.

42/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 44 (A/44/44/Add.1), para. 14.

43/ General Assembly resolutions 33/183 E and 34/93 F.

44/ General Assembly resolution 35/206 D.

45/ General Assembly resolution 41/35 F, 42/23 F and 43/50 J.

46/ Paul Conlon, "International oil trade and South Africa's energy requirements" (A/AC.234/4), para. 104.

47/ The unofficial translation of the Danish act uses the phrase "in Danish-owned ships".

48/ Restatement (Third) of the Foreign Relations Law of the United States (1987), sect. 402(1)(2), comments c and e, pp. 238-240.

49/ Conlon, "International oil trade ...", para. 107.

50/ Official Records of the General Assembly, Forty-second Session, Supplement No. 45 (A/42/45), annex I, p.24.

51/ Ibid., p. 26.

52/ Ibid., p. 23.

53/ Singapore so informed the Intergovernmental Group in September 1989.

54/ Official Records of the General Assembly, Forty-third Session, Supplement No. 44 (A/43/44), annex I, p. 13.

55/ Just because a State has no oil-exporting or oil-shipping capacity or any other connection with the oil trade does not mean that individuals or corporations that are its nationals or doing business within its territory cannot be actively involved in supplying oil and petroleum products to South Africa. Marc Rich, operating out of Switzerland, is a leading case in point. See Paul Conlon, "Strategies by the South African Government and transnational corporations to circumvent sanctions" (paper prepared for the United Nations Centre on Transnational Corporations, May 1989), p. 36.

56/ E/C.10/AC.4/1989/4, p. 30.

57/ See para. 20. An additional provision that might be included in the model law - set out in the annex to the present report - exceeds this scope by prohibiting assistance to South Africa that would assist it in developing its oil-from-coal capacity.

58/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 44 (A/44/44/Add.1), para. 11.

59/ A/AC.234/4, para. 103, also states that "this is the case within the European Community countries".

60/ "The inclusion of one is the exclusion of another", Black's Law Dictionary, 687 Fifth edition, 1979.

61/ The existing loophole that such a provision is designed to close was mentioned by several witnesses at the April 1989 hearings on the oil embargo against South Africa.

62/ Conlon, "strategies by the South African Government ...", p. 56. "Much of the oil that reaches South Africa is laundered via free ports and offshore storage tanks. The exporting country, which in all cases has prohibited its sale or resale to South Africa, is provided with documents that show that the oil has been discharged in the country where the free port is located; the de facto export of such oil to South Africa is not even recorded as an export by the authorities since the oil never entered their customs jurisdiction in the first place. This presumably explains why much oil is re-exported to South Africa from harbours in countries which have prohibited oil exports to South Africa." This quotation comes from an unpublished paper entitled "Sanctions and Trade" made available by the United Nations Centre against Apartheid.

63/ Conlon, "Strategies by the South African Government ...", p. 51.

64/ On the importance of all States, not just oil-exporting or oil-shipping ones, enacting a South African oil embargo law, see para. 33.

65/ Restatement (Third) of the Foreign Relations Law of the United States, sect. 402(2) (1987).

66/ Ibid., sect. 402(1).

67/ Ibid., sect. 402, p. 276, reporters' note 2 (1987).

68/ 15 C.F.R., sect. 785.4(a)(13) (1990).

69/ See South Africa Project of the Lawyers' Committee for Civil Rights Under Law, "Implementation of the Anti-Apartheid Act of 1986", p. 66, n.198 (June 1988). It should be noted that United States regulations implementing the United Nations Security Council-mandated sanctions against Southern Rhodesia also excluded the foreign subsidiaries of United States corporations from their application, thus enabling the Mobil Corporation to continue to supply oil and petroleum products to the Smith regime via its subsidiary, Mobil South Africa. Richard Lillich, "Examining Mobil's Role As Sanctions-Buster", South, 15 April-May 1981, p.4.

The rationale behind excluding foreign subsidiaries from the reach of the Southern Rhodesian sanctions regulations, when they had been included under all previous United States sanctions programmes (and have been included in all subsequent ones except for South Africa), is both interesting and relevant to the proposed model law: "The United States sanctions were so limited because, given the multilateral character of the United Nations embargo, it was more appropriate for the other United Nations Member States to enforce the embargo in their own territory. For the United States alone to have applied its sanctions extraterritorially would have gone beyond the mandate of the United Nations ... ". Office of Foreign Assets Control: Office of the Assistant Secretary (Enforcement and Operations), Report on Investigations into Alleged Violations of the Rhodesian Sanctions Regulations by the Mobil Oil and Caltex Petroleum Corporations (5 October 1985).

The second sentence in the above quotation is doubtful. Cf. Lowenfeld, op. cit., p. 479: "Does the fact that the offence is by definition of the Security Council an international one remove the territorial restraints on enforcements by individual states? Is trading with Rhodesia, in other words, like piracy or aerial hijacking or slavery?"

70/ The literature is voluminous. For an excellent treatment of the topic from a United States perspective, see Thompson, United States Jurisdiction Over Foreign Subsidiaries:

Corporate and International Law Aspects, 15, Law and Policy in International Business, 319 (1983).

71/ Case of the SS Lotus (France versus Turkey), 1927 Permanent Court of International Justice, series A. No. 10, p. 19 (judgment of 7 September).

72/ Sixth report of the Security Council Committee established in pursuance of resolution 253 (1968) concerning the question of Southern Rhodesia, Official Records of the Security Council, Twenty-ninth year, Special Supplement No. 2, pp. 30 and 31.

73/ Although the Legal Counsel did utilize some "double talk" (see Lowenfeld, op. cit., p. 480) his reading of public international law precedents and his obvious concern with obtaining State enforcement of United Nations sanctions against Southern Rhodesia suggests that his views were compatible with the interpretation advanced in the text.

74/ Restatement (Third) of the Foreign Relations Law of the United States, sect. 414(2) (1987).

75/ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970), Advisory Opinion I.C.J. Reports 1971, p. 16.

76/ Adopted on 21 December 1965 (entered into force on 4 January 1969), General Assembly resolution 2106 A (XX).

77/ Adopted on 30 November 1973 (entered into force on 18 July 1976), General Assembly resolution 3068 (XXVIII).

78/ Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10).

79/ Restatement (Third) of the Foreign Relations Law of the United States, sect. 702(f) (1987), p. 167, comment n.

80/ The statement in the text finds support in a recent report submitted to the International Law Association concluding that "States which practice lone abstentionism with respect to widely supported anti-apartheid policies might have a hard time if, before the International Court of Justice, they sought to challenge alleged excesses of jurisdiction on the part of regulating States attempting only to make their sanctions policies watertight." International Law Association, report of the Committee on the Legal Aspects of Extraterritorial Jurisdiction 10 (Queensland 1990).

81/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 44 (A/44/44), para. 62 (e).

82/ Ibid., Forth-second session, Supplement No. 45 (A/42/45), p. 34.

83/ 22 U.S.C., sect. 5113 (1988).

84/ Penalties for sanctions violations in a half-dozen other States, considerably less stringent than the ones in the United States, are summarized in the Report of the United Nations Centre on Transnational Corporations (E/C.10/AC.4/1989/4), p.27.

85/ At present, apparently only Norway has provided for confiscation of illegally exported oil, with the confiscation applicable only to the oil and not the ship as well (see para. 31).

86/ A study of possibly third-party actions in various jurisdictions is beyond the scope of the present report, but potentially it could be of great importance in thwarting South Africa's acquisition of oil and petroleum products, especially if the "end user" clauses and "discharge certificate" provisions recommended in para. 38 are included in the model law. For an exceptionally restrictive private right of action granted by the United States Comprehensive Anti-Apartheid Act of 1986, see 22 U.S.C., sect. 5083 (1988).

87/ Conlon "Strategies by the South African Government ...", p. 18.

88/ See Jhabvala, "The Practice of the Human Rights Committee 1976-1982: Review of State Party Reports", 6 Human Rts. Q.81, 95-106 (1984); Shelton, "Supervising Implementation of the Covenants: The First Ten Years of the Human Rights Committee", 80 American Society for International Law. Proceedings 413 (1986). See, generally, Fischers, "International Reporting Procedures", in Guide to International Human Rights Practice p. 165 (H. Hannum, edition, 1984).

89/ See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 44 (A/44/44), para. 62 (d). Other strategies that the Intergovernmental Group might utilize to increase the effectiveness of the oil embargo by means of the model law and steps taken to monitor its adoption and implementation, while beyond the scope of the present report, are worth further study. Compare generally the suggestions in Fischer, "International Reporting ... ", pp. 178-183.

Annex I

MODEL LAW FOR THE EFFECTIVE ENFORCEMENT OF THE UNITED NATIONS GENERAL ASSEMBLY OIL EMBARGO AGAINST SOUTH AFRICA

Section 1. **Purpose**

The purpose of this Act is to implement, to the fullest extent possible, the United Nations General Assembly's embargo on the supply of oil or petroleum products to South Africa.

Section 2. **Prohibition of the export of oil or petroleum products to South Africa**

No person subject to the jurisdiction of Ruritania shall:

(a) Supply oil or petroleum products, or assist or cooperate in the supply of oil or petroleum products, either directly or indirectly, to South Africa, or to any natural person or legal entity in South Africa; or

(b) Ship oil or petroleum products, or assist or cooperate in the shipment of oil or petroleum products, either directly or indirectly, to South Africa or to any natural person or legal entity in South Africa; or

(c) Facilitate, by means of trading, transshipping, refining or in any other way, the supply or shipment of oil or petroleum products, either directly or indirectly, to South Africa or to any natural person or legal entity in South Africa.

Section 3. **Proof of compliance with the prohibition of the export of oil or petroleum products to South Africa**

(a) Any person subject to the jurisdiction of Ruritania who enters into a contract for the sale of oil or petroleum products from within its territorial jurisdiction, which for the purposes of this Act shall include bonded storage, free ports, free zones and other offshore facilities, shall include an "end user" clause, whereby the buyer of the oil or petroleum products is obligated not to resell or permit the resale of the oil or petroleum products to South Africa or to any natural person or legal entity in South Africa.

(b) The buyer of oil or petroleum products under a contract described in paragraph (a) shall furnish the seller, within a period of 90 days, with a "discharge certificate" confirming the

ultimate disposition or use of the oil of petroleum products received under the contract.

(c) Both the seller and the buyer of oil or petroleum products under a contract described in paragraph (a) shall cooperate with all post-sale inquiries by officials of Ruritania, or by officials of the United Nations, to verify the ultimate disposition or use of the oil or petroleum products, and shall disclose the identity of any natural person or legal entity to whom the oil or petroleum products were resold.

Section 4. **Invalidity of contracts for the sale of oil or petroleum products to South Africa**

Any contract which purports to sell or resell any oil or petroleum products to South Africa or to any natural person or legal entity in South Africa shall be absolutely null and void.

Section 5. **Seizure and confiscation of ships and aircraft carrying oil or petroleum products to South Africa**

(a) Any tanker or other ship flying the flag of Ruritania or owned or controlled, directly or indirectly, or managed or chartered, by persons subject to the jurisdiction of Ruritania, that is found to be carrying or has carried oil or petroleum products to South Africa in violation of this Act shall be subject to seizure and confiscation, together with its cargo.

(b) The provisions of paragraph (a) shall apply to aircraft registered in Ruritania, or owned or controlled, directly or indirectly, or managed or chartered, by persons subject to the jurisdiction of Ruritania.

Section 6. **Penalties**

(a) Any person subject to the jurisdiction of Ruritania who wilfully violates any provision of this Act shall be subject to a civil penalty of up to ($US 50,000).

(b) Any person subject to the jurisdiction of Ruritania who negligently violates any provision of this Act shall be subject to a civil penalty of up to ($US 25,000).

(c) Any individual subject to the jurisdiction of Ruritania who wilfully violates any provision of this Act shall be fined not more than ($US 50,000) or imprisoned not more than 10 years, or both.

(d) Any person, other than an individual, subject to the jurisdiction of Ruritania that wilfully violates any provision of this Act shall be fined not more than ($US 1,000,000).

(e) Any person subject to the jurisdiction of Ruritania who knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or documents in connection with any transaction covered by this Act, knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than ($US 10,000), or imprisoned not more than five years, or both.

Section 7. **Definition of "person subject to the jurisdiction of Ruritania"**

For purposes of this Act, the term "person subject to the jurisdiction of Ruritania" means:

(a) A natural person who is a citizen of Ruritania, or who owes permanent allegiance to Ruritania, or who is an alien lawfully admitted for residence in Ruritania; or

(b) A corporation, partnership, or other business association or legal entity which is organized under the laws of Ruritania, including foreign branches and subsidiaries of such legal entities.

Addendum

Section X. **Prohibition of assistance to South Africa that would assist it in developing its oil-from-coal facilities**

No person subject to the jurisdiction of Ruritania shall provide any assistance, either directly or indirectly, to South Africa - whether through finance, technology, equipment, personnel or in any other way - that would assist in its construction, operation or maintenance of its oil-from-coal facilities.

Annex II

TRANSCRIPT OF REMARKS BY LEGAL EXPERTS AT THE MEETING OF THE INTERGOVERNMENTAL GROUP ON 31 AUGUST 1990 IN CONNECTION WITH THE PRESENTATION OF THE DRAFT MODEL LAW ON THE OIL EMBARGO AGAINST SOUTH AFRICA BY PROFESSOR RICHARD LILLICH

Participants:

Richard Lillich - University of Virginia, Charlottesville
Stephen Cohen - Georgetown University, Washington, D.C.
Hurst Hannum - Fletcher School of Law and Diplomacy, Boston
Andreas Lowenfeld - New York University
Michael Malloy - Fordham University, New York

Professor Richard Lillich

I appreciate the opportunity to be here today and to consult with the Intergovernmental Group on this particular problem. Some of you may know that I've been involved in sanctions and sanctions enforcement since the days of Southern Rhodesia, now Zimbabwe. One has learned a lot of lessons during that period, and I am delighted to see that in the last three or four years the Intergovernmental Group has taken advantage of a variety of suggestions to develop strategies, and is continuing to develop strategies, to make the oil embargo against South Africa more effective.

What I have done in my report is to summarize, in some detail, the evolution of the Group's interest in this consideration. I want to emphasize that the statute is a draft statute. We are here today and I presume we will consult hereafter on ways to make a more effective statute that the Group can recommend to States for their consideration and, with appropriate revisions, taking into account local concerns and local legal regimes, for their possible adoption.

What I propose to do today is to highlight - under the assumption that there may be people who have not been able to have the opportunity to go through the report in a very detailed fashion - what I think are the most important features of the statute - not by focusing upon the statute itself, but by focusing upon some of the conclusions that I have drawn from my survey of the various country reports that have been made with respect to what steps countries have taken to implement this voluntary oil embargo.

The three reports of the Group, at least the first two, contain very detailed responses about what States have or have not done to implement the embargo. But we are working from a relatively small informational base, because, if my statistics are correct, only 65 of 160 States have responded to the Group's requests. And, as I say in my report, some of those 65 responses are relatively cursory, to say the least. Some, it is fair to say, are detailed, but others do not contain the specificity that one would expect in governmental responses.

Now in the first two reports the Group reiterated the necessity of having statutory law of its equivalent in force. The whole concept of United Nations sanctions is, to some extent, a misnomer. Sanctions are promulgated by the United Nations, here by the General Assembly, but they are enforced through the domestic laws, decrees, regulations, executive orders and what-have-you of particular States. And the Group has been urging and, I think rightfully so, for several years, that States enact legislation or other forms of law in this particular area. And the Group has gone beyond that in its first and second reports to pick up not only the sale of oil and petroleum products, but also the shipping and, more recently, any other activity that would be designed to convey oil directly or indirectly to South Africa.

My first involvement with this was with the hearings in April 1989, which were very interesting and in which the Group indicated that a substantial number of witnesses had made just the point made in the first two reports - namely, that legislation was required and that that legislation had to be fairly detailed in nature and that general assurances that an embargo was in place would be inadequate.

And so what I have done in my report is to survey all of the legislation that has been called to my attention, either through reports to the Group, or from independent investigations, and to attempt to highlight both the strengths and the weaknesses of the legislation in place, and then to suggest ways in which I think the statute should be drafted. And I do not propose to focus in detail upon the statute. I am quite willing to respond to any questions. I am sure my colleagues have questions and comments and suggestions to make in that regard as well. But I would like to focus upon what I find to be the major purposes of the statute, which of course are based on the fact that a variety of States have enacted measures that are effective and other States have enacted measures that are not so effective and therefore it is useful to identify what should be done in order to get an effective embargo.

I should also say, and this is in respect to the material in paragraph 18 of my report, where I quote from a United Nations Centre on Transnational Corporations report, what is the cumulative effect of the General Assembly resolutions with respect to the oil embargo against South Africa. I do point out later in my report, that the statute does not necessarily match every single thing that is desired to be prohibited by the General Assembly. Indeed, the Group's reports themselves focus, and I think very prudently and correctly, on the sale and on the shipment and otherwise facilitating the transfer of oil and of petroleum products to South Africa. But I do call the Group's attention to the fact that the resolutions of the General Assembly are broader than that. But I think that the Group has made the correct decision - and I have followed that decision in

drafting the statute - limiting its concern to these three things and not taking up some of the other points.

Let me just call attention to three of the other points in paragraph 18. Paragraph 18(c) deals with the prohibition of investments in, or supply of equipment to, the petroleum industry in South Africa. And that is not touched in the statute, and has not been touched, of course, by the Group in its inquiries to States to date, and it has not been recommended by the Group that legislation in that area is necessary. I am not suggesting that legislation would not be desirable ultimately. My point is that I think one has to begin with a common core of agreed objectives here, and as I have suggested before, I think by limiting it to the sale of oil, the shipment of oil or facilitating the sale and shipment of oil, the Group is doing what it should be doing at this stage of the development of the oil embargo.

Similarly, paragraphs 18(f) and (g) refer to provisions that are found in a variety of General Assembly resolutions prohibiting any assistance through finance, technology, equipment and personnel to develop oil from coal plants, etc., in South Africa, or to prohibit South African nationals or corporate interests from acquiring interests in oil companies within the territories of the States concerned. The statute does not deal with this because the Group has not yet recommended it. I am not suggesting that ultimately this would not be desirable. But at this stage, the statute focuses on the objectives established by the Group.

In going over the legislation, to the extent that it is available from the 65 States that have reported, and I should say, as far as I know, that no investigation has been made either by the United Nations or by other sources beyond those 65 States, one finds a number of disquieting factors, and I have ticked off a few of these in paragraphs 22-31 of my report. First, at least one third - over 20 of these 65 States - acknowledged that they had done nothing whatsoever in this particular area and did not intend to do anything in the future. Many of those States identified as a reason for doing nothing the fact that they did not sell or ship oil to South Africa. I suppose this is understandable, but in this day and age of multinational corporations and corporate subsidiaries and the using of offshore companies for international trade and transactions, one has to have a comprehensive and uniform statutory pattern. The fact that those States do not have legislation presents at least the possibility in some cases of ways to avoid the embargo. And that I found to be somewhat disquieting - the fact that there was no legislation, much less interest in this area.

Secondly, more than a third of the States said that they had not enacted legislation because they were handling it through general embargo provisions that they had against South Africa.

Well, this may or may not be true. Further investigation in this regard would have to be made of every State. But it seems that a general approach to this is insufficient. After all, we have an embargo mandated by the General Assembly referring to oil and petroleum products. This requires, it seems, some affirmative action by States to take particular care to identify and create legislation or some kind of executive measures that would single out the sale and the shipping and the facilitating of the sale and shipping of oil to South Africa as an offence under the laws of the particular States.

Thirdly, there are many instances where there is special legislation, although that legislation does not cover all of the transactions. For instance, it does not cover petroleum products in some instances, it just deals with oil itself, whereas all of the regulations, all of the Group's concerns, refer both to oil and petroleum products. In paragraph 25, I describe the evolution of the EEC approach in this regard. It is more comprehensive than it was initially, but it still falls somewhat short of what the General Assembly has mandated and what the Group has recommended.

Another problem, the fourth problem, is discussed in paragraph 29, where I indicate that in many instances the laws or regulations are silent as to whom is covered by them as distinguished from what is being covered. In some instances, we refer to Danish-owned ships, or Singapore-flag ships, but in other instances there are ambiguities. They are just general statements based upon the usual way of acquiring jurisdiction under international law, the nationality or the territorial principles. But there are many instances where we have ambiguities about the coverage of the legislation and this is something that I come back to when I discuss the necessity, as recommended in the Group's hearings in April 1988, on applying sanctions to the subsidiaries and branches of multinational corporations.

This, as we all know, was the way in which the oil embargo, and indeed the embargo in general, against Southern Rhodesia was flagrantly broken by a variety of British, Netherlands and American corporations. It is the largest loophole, it seems to me. Theoretically, of course, the idea is that all States will pass legislation and effectively implement that legislation. Certainly that did not occur in Southern Rhodesia. It is obviously not occurring in the context of South Africa either. And for that reason it is necessary to extend jurisdiction as far as permissible in international law and, for the reasons that are developed in the report, it is certainly permissible since we have the General Assembly resolutions. It may be voluntary, but there is enough international consensus to warrant the extension of jurisdiction to the subsidiaries and the branches of multinational corporations.

The fifth point that I found in going through the statutes was that there seemed to be almost no mention, with the exception of three or four, of penalties under the statutes. In its several reports, the Group has said over and over again, and I think rightly so, that unless conduct that is in violation of the embargo is penalized, and penalized severely, the deterrent effect of what legislation is in place will be lessened. The second report that I refer to in paragraph 30 indicates the need to create a deterrent to violators and that that deterrent has to be a serious deterrent. And one finds almost nothing in the response by countries to the Group's request for information indicating the extent to which they have criminalized or put civil penalties upon the selling, shipping and trading in oil to South Africa. There are references to black-lists, to the fact that countries will refrain from dealing with shippers that are engaged in sanctions violations, etc. But there is very little to indicate that there are serious sanctions applied. And, as the Croup indicates in its second report, which I quote in paragraph 31, this is something that certainly should be remedied.

Now, taking into account these five major areas that, I believe, must definitely be covered in any model statute, what I have done in the last part of my report is to suggest ways in which the statute should be drafted to take into account what I perceive to be the weaknesses in existing legislation. This does not mean that any model law may not have some weaknesses itself, as we find in domestic legal systems, the tax system of course being a classic example. One legislates and then smart lawyers find loopholes, and then one goes back and legislates again to cover up those loopholes. But at least having once identified, as I think my report does and the Group's reports do, the major weaknesses here, one has to draft a statute that in effect will cover up these major weaknesses. And if that statute itself contains some loopholes, this is something that would have to be refined in future years.

Now I have started these recommendations in paragraph 36, in which I say that any statute has to be as extensive as what the General Assembly, and then the Group, have endorsed as the major purposes. It must cover oil and petroleum products. It is not good enough for a State to say that it is not shipping oil. That is a true statement that implements the embargo, but if that State is participating in the shipment of petroleum products, obviously that's a violation of the sanctions effort and should be controlled. And so therefore it has to be a statute that covers the sale and the shipping of both oil and petroleum products.

Secondly, the prohibition, as I say in paragraph 7, must cover the export of oil or petroleum products from anywhere within the territorial jurisdiction of the State and fictions

should not be allowed, as in the case, I hate to say it, of EEC, but fictions should not be allowed to play a role here and to allow States to say "we are not shipping from our territory because technically it is not our territory, it is in bonded storage", or "we have a free port" or "it comes from a free zone or some other offshore facility". And so one has to indicate specifically the coverage of the statute in this regard.

Thirdly, with respect to oil exportation, there are a tremendous number of references, and the Group has picked this up in its reports, about the need for end-user clauses in sales contracts. That is something that I would suggest, and the Group has already adopted this as a matter of policy, so I am, in effect, trying to implement the Group's policy in this regard. End-user clauses should be included in major contracts so that no oil exporting State could permit the sale or resale of oil and petroleum products to South Africa.

Fourthly, this is mentioned in paragraph 39 - we are concerned not only with the actual sale, prohibiting the sale and the resale, but also the shipping and beyond the shipping. Anyone who is involved in any transaction directly or indirectly in any phase of the trading, transshipping or refining of oil should be picked up by the statute. I find that in the legislation, as reported to the Group, almost no States go that far and I would cast my net very wide in this regard.

The fifth point picks up the weaknesses I found in the statutes and in the reports of States with respect to identifying who should be covered. I think those persons, whether natural persons or corporate persons, should be identified first in fairness to them. Obviously any law that carries with it penalties has to identify quite clearly who is to be subject to those penalties, whether civil or criminal.

To make it effective, one has to spell out in substantial detail who is being picked up by the statute concerned. For that reason, I spend several pages on the necessity of defining who is within the statute, emphasizing of course the need to cover subsidiaries and branches.

In paragraph 41, I refer to section 321 of the United States Comprehensive Anti-Apartheid Act of 1986. That statute, of course, is not officially before the Group because the United States, unfortunately in my estimation, has not seen fit to report in response to three requests from the Group for information. But, on the other hand, the Anti-Apartheid Act is a very useful Act for purposes of the oil embargo against South Africa. It so happens that, unfortunately, section 321 does not apply to foreign subsidiaries of United States oil companies, but is comprehensive in so far as it applies to both crude oil and petroleum products. And I suggest that, as the United States

statute does not, and as far as I can see, as none of the other statutes do, this model statute should apply to subsidiaries as well. And I have in paragraph 43 linked the quotations from a report that was prepared by the United Nations legal counsel in the context of Southern Rhodesia and other references to show that doing so would be a permissible extension of this jurisdiction under international law.

Sixth and finally, the model statute certainly has to have serious penalties attached to it. And here it is fair to say, as I think I have suggested before, that in the reports to the Group and in the statutes I have seen, it is very hard to see that there are serious penalties either on the civil or criminal side. As will be noted in the statute, and as I state in paragraph 46, I think there is some useful guidance in the United States Comprehensive Anti-Apartheid Act of 1986, which establishes both fines and civil penalties that go up to $50,000 or even in some instances call for prison terms or both and fines of up to $1 million in the case of corporations for wilful violations. If one is to take this sanctions effort seriously, it seems to me, one has to criminalize as well as adopt civil penalties.

So this is a brief overview of what I have learned and am presenting to the Group in the context of the reports that have been made to the Group, and in my own independent survey of the statutes and other legislation that is available. What I have done is to follow the guidelines that the Group has adopted here in so far as focusing upon the sale and resale, the shipment and facilitating the sale and resale and shipment of oil.

I have not gone to the full range of everything that has been suggested or recommended in a variety of the United Nations resolutions. But I think I have prepared a statute here that focuses upon the major concerns and serves as a good beginning, and, as I suggest towards the end of the report, could have several functions. I am not particularly optimistic that there will be a rush of States to adopt legislation, even if the most perfect of model laws can be furnished to them later in this year. But I do think that a number of States will certainly follow this lead. Most importantly, perhaps the draft statute will provide a benchmark against which the Group can survey reports of States in the future.

The Group has begun a very interesting dialogue with States in this regard and I suggest that the Group carry on and develop that dialogue and be more aggressive in doing so. And, by utilizing this model statute as a benchmark for assessing the compliance of States with the oil embargo, the Group has something that it can specifically point to and question them about.

For that reason, and for the desirability of establishing a general principle for the enforcement of United Nations sanctions that might go beyond the situations in South Africa and apply to other situations, I suggest that the model statute, which is set out in annex I to my report, serves as a good basis for at least an initial step.

In conclusion, let me emphasize that this is a draft statute. A typical lawyer's comment is that there's no pride of authorship here. This has to be, of course, a collective effort between the Intergovernmental Group and ultimately the States that are going to adopt this legislation. I believe that it is a good first step. It could be taken further. Perhaps some people will think the statute goes too far. Perhaps some people will think the statute does not go far enough. But I would suggest that it is a good beginning and I recommend it to you and for your consideration.

Professor Stephen Cohen

I want to thank the Group for the opportunity to work on this very important project. I also want to commend Professor Lillich on doing an excellent job.

I have made comments on a number of Professor Lillich's drafts, and he has very graciously accepted many of my suggestions. I will now very briefly make two points.

The first point concerns paragraph 18 of Professor Lillich's report. It is a point called for in General Assembly resolutions, but which under the mandate of this Group, the model statute was not to cover. And it says in paragraph 18(f) that General Assembly resolutions have called upon Governments to prohibit any assistance to South Africa through finance, technology, equipment or personnel in the construction or operation of oil-from-coal plants and the importation of oil-from-coal technology by South Africa.

I would urge the Group to consider drafting, in addition to a model statute that prohibits the shipment of oil or petroleum products to South Africa, an additional statute that would prohibit the shipment of technology or equipment that would aid coal oil conversion. A very, very critical part of South Africa's strategy for dealing with any international oil embargo that becomes effective is to increase its coal-to-oil conversion capabilities. As I am sure all of you know, a number of major coal-oil conversion facilities have already been constructed in South Africa, but they are not able to meet 100 per cent or anywhere near 100 per cent of their energy needs through these facilities should an effective oil embargo on the shipment of oil

or petroleum products be implemented. I would suggest as a second step that this area is very crucial.

The other point I wanted to make briefly is that, although there have been a lot of traumatic events in South Africa during the past six months, there has also been the release of Nelson Mandela and the opening up of the possibility for many political exiles to return. My own judgement is that we are still many years away from a real end to apartheid. The task of putting sufficient international pressure on South Africa to encourage change is as urgent and important as it ever was and implementing an effective embargo on oil and petroleum products as a means of pressuring the regime to end the apartheid system and negotiate a political solution is as important as it ever was, notwithstanding the events of the past six months. I think the need for pressure is as great as it ever was, if not greater. I just wanted to make those two points and thank you again.

Professor Hurst Hannum

I, too, will be very brief, having had the opportunity to make comments on drafts of the report. I am certainly very pleased to associate myself with the report and all of its major aspects. I think it and the model statute do provide an excellent direction for the future. I will offer two or three comments - not on the model statute but on the work of the Intergovernmental Group. I would like to begin by complimenting the Chairman and the Intergovernmental Group on the practical approach referred to by the Chairman in his opening statement. This kind of practical approach is evidenced, for instance, by monitoring port calls and identifying that work in annexes to the Group's reports. Unfortunately, this approach is all too infrequent in many intergovernmental bodies.

I would like to reiterate a suggestion made by Professor Lillich at the end of his comments, which is the need to follow-up on information already received from Governments and to initiate a true dialogue with Governments (and also non-governmental organizations), as opposed to simply receiving information. The element of publicity, as mentioned by the Chairman is key to the Group's work. I think that in every one of the Group's reports a list should be maintained of those Governments which have responded to the Group's requests for information and for clarifications. These are, after all, voluntary sanctions, and while volunteerism depends on the goodwill of Governments, it may also depend on the embarrassment of Governments.

The Group, as an intergovernmental group, is limited in the steps that it can take. But I think that merely reporting information, such as identifying the Governments that have

responded to requests for additional information, would be appropriate. Consideration might also be given to inviting Governments to respond orally to some of the questions that the Group might have; indeed, one might consider inviting not only Governments, but non-governmental organizations, oil companies or shipping companies to respond to some of the Group's questions.

It is not necessary to have domestic legislation in any country of the world to stop the flow of oil and petroleum products into South Africa. As is the case with many private organizations around the world that have eliminated their investments in South Africa, it is open to any individual transnational corporation to decide to stop its own shipments, and this private, voluntary form of embargo should not be overlooked in the Group's work.

Finally, consideration might be given to examining the techniques adopted by the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, which have in a non-confrontational way managed to engage Governments in a dialogue on extremely sensitive issues. I think that such a dialogue might also be possible within the present context.

Professor Andreas F. Lowenfeld

I am honoured to have been invited to share my thoughts with the Group, and I join it in being grateful to Professor Lillich for a very comprehensive and thoughtful report. I apologize in public to Professor Lillich for not having given him my comments on his statute. Because of the vagaries of travel over the summer, it turned out that some of the things I wanted to say in public might have been said to him before. I am a lawyer and a law professor; I am not an expert on South Africa. I am, however, an expert - as a lawyer, as an official in the United States Government and as a scholar. I have been involved for some 30 years with the questions of sanctions and generally with the regulation of international economic activity.

What I would like to do, and what I thought might be the most helpful, is to look at the statute and make some suggestions with respect to the statute - not to draft it here in public, but to make some suggestions.

One measure that has been used from time to time by the United States in particular, and also, I believe, by the United Kingdom, is in focusing on shipping - with respect to third-country shipping - shipping other than ships registered in the particular country or owned by its nations - if a ship is known to be trading with South Africa, either generally or in petroleum or petroleum products, then it will be denied entry for commercial purposes to the particular country. I would not

exclude coming into port in cases of distress at sea or emergency, but not for commercial purposes. That is a kind of deterrent that may well be easier to enforce than a criminal penalty.

The second kind of deterrence, which is somewhere between an administrative, civil and criminal penalty, which has been used with a good deal of success in the United States, is to say to firms - individuals as well, but primarily firms - that if they have been found to violate the embargo, they will be denied the privilege of engaging in the export trade. Now it can be a blanket denial, or it could be, for example, a denial limited to petroleum and petroleum products, or both. It could be for six months or it could be for the duration of the embargo. It is a way by administrative means, without becoming involved with the criminal law system, which has, as many of you know, a number of difficulties. It is a way for deterring and discouraging and punishing the violations of an embargo that would require a provision in the statute, but it is not difficult, I think, to do that.

Third, Professor Lillich has suggested specific penalties which he has put in dollar amounts in section 6 of the draft statute. Another way to do that, which has been done, for example, in model laws with respect to aircraft hijacking and violations of the rights of specially protected persons, would be to say that each country shall punish a violation of the embargo in the manner provided for punishment of felonies. There may be different monetary amounts, but the point is, it is a serious crime.

I have two suggestions that seem to cut in the opposite direction. I am concerned about the proposal to require end-user certificates. I am not concerned about requiring ships to state where they unload. But oil is traded very quickly and widely in exchanges, in stock markets, in futures markets and I worry that parliaments and legislatures will say, if we require end-user certificates every time there is a trade in oil, we will dry up the trade in oil and therefore will not pass the statute at all. So I worry about requiring end-user certificates.

As you know, oil is fungible, oil runs through pipelines. If any of you go here to Bayonne, New Jersey, right out of the Holland Tunnel in New York, you will see there is the terminal of the Colonial Pipeline. Some of you may be loyal to a particular brand of gasoline; some of you may like Shell or Exxon or Texaco. Well, it all comes through the same pipeline. The idea that you can get that kind of end-user certificate may be a bit too much.

Another critique - and I hope Professor Lillich will take it in the way it is offered - section 4 of the draft statute says any contract that involves sale of petroleum or petroleum

products to South Africa or a natural person or entity in South Africa shall be absolutely null and void. I would do two things with that. I would say that no court shall award any damages for non-performance of such a contract or any part thereof after a given date. And then I would say there should be included a given date, something like 30 days after the effective date. I think many countries have been reluctant to violate the so-called sanctity of contracts. On the other hand, we have seen that long-term contracts, in some cases involving the United Kingdom, for instance, even the notion that a long-term practice is regarded as equivalent to a contract, that is a very big loophole where I think a reasonable compromise is to say the annulment of contracts takes effect as from 30 days or 60 days. I think that would make it easier to adopt the statute, easier to enforce it and easier to punish people who may have been acting with some reliance.

Finally, one more comment: that is the question of jurisdiction beyond one country's borders. Professor Lillich quotes it several times in his report - the American Law Institute's restatement. I was the rapporteur of the restatement. I was responsible for those sections. I was associate rapporteur, but these sections were the ones that I largely worked on. What we find is not a complete consensus, but what we find is a reluctance sometimes, where there is direct conflict, where State A prohibits what State B requires. And in State B, you may have a subsidiary of a company owned in State A. And in those circumstances, there is a good deal of controversy.

I do not think we have that situation here. If what we have is that State A is in favour of the embargo and has taken disciplined steps such as passing the statute to enforce it, State B says, "Yes, we are also in favor of the embargo, we oppose trade with South Africa. Or at least we oppose trade in petroleum products, but for these reasons or that reason, we have not gotten around to enforcing or passing a statute". That is not a real conflict, and in that situation, I think State A should not be in any sense reluctant or hesitant about adopting a statute and extending the two actions taken in State B under the control of the principles in State A. I think that doing that in no sense violates international law. On the contrary, it spreads the compliance with the commitment to international law. Well, those are my brief comments; I hope they are not regarded as too technical. But I think Professor Lillich has made an excellent report and I commend his report and the draft statute to the Group.

Professor Michael Malloy

First, I wish to thank the Chairman and the Group for inviting me to be present, to have an opportunity to take a look

at what I view to be the very excellent work of Professor Lillich and his colleagues. I come to you and I view this exercise from two perspectives. On the one hand, I am an academic who has an academic's interest in the issues that the Group is considering and on which Professor Lillich has been advising. I am also someone who has served with my country's Government, the United States, as an official implementing economic sanctions, programmes undertaken by the United States and, more specifically, as someone who was charged with the responsibility of enforcing those kinds of programmes, often given circumstances of very frustrating and unfulfilling destiny.

Nonetheless, I cannot help but look at a model law such as this without almost unavoidably considering it from the point of view of an enforcer as opposed to a reclusive academic. Let me begin by saying that I find the approach and the skill and the deftness of technique in the model law quite admirable. Any comments that I might offer, are merely intended to be supportive, and indeed, I have already provided Professor Lillich with a more detailed written statement of some technical suggestions for his consideration. I would begin by saying this. I think it is almost incontrovertible that enforcement on an individual State level of sanctions against South Africa, is, to be polite, extremely thin and rather unimpressive.

I had occasion in the course of writing a book to examine in some detail and to analyse data available from the International Monetary Fund (IMF) in the material that it gathers in reports from Member States, and I drew from my examination of that material precisely the same conclusion that Professor Lillich drew from the review of responses submitted to the Group. Not only on a statistical basis was the active participation of States in any kind of sanctions effort extremely thin in terms of the numbers, but as one looked from State to State, the disparity in terms of the kinds of sanctions being applied, the seriousness and severity of those sanctions, was perhaps the most striking thing in the whole exercise.

On the other hand, I think it is quite clear that techniques are available for putting in effective sanctions at the national level, if there is a commitment, if there is an institutional will to do so. There are many examples, I know, from United States law and practice, of such techniques being employed and it is a source of some embarrassment to me to find how relatively few of those techniques in United States law were included to the full extent they could have been in the Comprehensive Anti-Apartheid Act.

In terms of these techniques, I think there are three guiding principles and I see much of it implemented in the work that has led Professor Lillich to produce this model law. First of all, I think, effective sanctions almost inevitably involve

broad sanctions - whether in terms of the subjects placed under the burden of sanctions, or in terms of the range of transactions which are cut off by sanctions. Without threat of sanctions within their appropriate area, one almost invites failure and ineffectiveness.

Secondly, at the technical level, it seems to me that the enforcement techniques of sanctions must have as their objective, the dramatic alterations of the way in which a commercial dealing with the target State calculates the commercial risk of the investment. If you do not make the continuation of commercial relationships with the target State significantly and practically expensive, it will never counter-balance the desire to engage in transactions. We have, unfortunately, far too many examples of human nature taking hold and allowing risks to remain unaltered among these companies. The suspected activities of many companies with respect to the Southern Rhodesian sanctions, I think, makes that clear.

Third, and related to the notion of breadth of sanctions, it seems to me that it is very important to include to the fullest extent possible collateral parties to these transactions. It is not enough to focus only on an oil company or an oil shipper, for two reasons. First of all, they have the highest incentive to avoid you and also the highest motivation to press on despite your efforts to prevent them, whereas many of the collateral parties will have a very different balance in mind and it may be that the most vulnerable part of the transaction occurs at the level of these collateral parties. In that regard in particular, I view it as a very promising feature of the model law that it does include, at least in general terms, a prohibition against facilitation.

From my own experience, as a practical matter, quite often it is that kind of prohibition and its careful enforcement that may break open a transaction and make the effects of the sanctions felt on the target.

I would like to say just a brief word or two about some of the features of the model law and leave the more technical and detailed comments to the consideration and good judgement of Professor Lillich. With respect to the prohibition in section 2(c) dealing with the facilitation, I very strongly recommend that section 2(c) explicitly refer to financing as well as the other kinds of transactions. I believe that one could fairly read paragraph 2(c), as it stands now, as covering that. But I think it would be worth the effort to indicate explicitly that those involved in the financing of these kinds of transactions are also going to be subjected to these prohibitions. These are very important collateral parties. They do not have the high stake in completing the transaction that the seller may have, but

they have a stake and one must make it clear that the calculation of risk for them has changed.

Secondly, I think it might be useful to consider as an additional paragraph of section 2 an explicit provision prohibiting evasions. This is a technique that has been included in many sanctions programmes with which I am familiar and the usefulness of it is that it may give enforcers an additional tool to attack a transaction or a contract, as it is beginning to evolve, and be put into place as a transaction is being restructured to avoid.

Now again, it may be that one could reach this same result by utilizing traditional notions of attempts in criminal law. But I have found in my own experience that the presence of an explicit prohibition on evasions is often a very, very useful device for demonstrating and then implementing a serious resolve to make sanctions work in practice.

I share in part Professor Lowenfeld's concern about the provisions in section 3, which in my view appear to dictate specific contract terms to parties involved in international commerce. My only observation in that regard would be that depending upon the orientation of the State considering the enactment of the model law, a provision dictating contract terms to private parties may be viewed as provocative and may make it difficult for the State, in the light of its own view, to adopt such a law with that orientation, which is not to say that that objective should not be achieved.

What I would suggest is an alternative approach to the same statutory objective. Namely, crafting a provision as a safe harbour provision, whereby one simply says that, if, in fact, a party subject to the jurisdiction of Ruritania has a contract with a third party national - that is to say, not a national of South Africa - and that contract includes the following kinds of provisions, then that contract arrangement will be deemed not to violate these prohibitions. In a sense, you give the incentive to the private parties to comply with these kinds of mandatory provisions.

If, as Professor Lowenfeld said, you have a situation in which the particular transaction is such that it is almost impossible to achieve that result, then the private party simply takes up the alternative burden of having to demonstrate that it had not violated these provisions. In effect, one invites the private party to align its interests with the State that is enforcing the embargo and let them choose which way this particular device will be used. I think it may also be a more palatable approach for some States that may feel dictation of private contractual terms to be too sensitive. It is the result,

it is the ultimate objective that is important and that may be a useful technique.

It is, for example, a technique that is extensively used in United States securities regulations, which rarely impose affirmatively particular styles of disclosure or contract terms and yet, as a practical matter, are constantly doing precisely that, simply by offering these kinds of safe harbours.

The only other comments that I would like to mention to the Group in this meeting are as follows. On the invalidity of contracts under section 4, to which Professor Lowenfeld referred, I am less impressed by the sanctity of contracts. I suppose having taught contracts it would be hard to be impressed by the sanctity of them, but I am particularly concerned because I have seen too often in recent sanctions programmes that have been put into place, that the attempt to craft a prohibition which still respects sanctity of contract has often resulted in a sanction whose implementation is not direct and dramatic, is open to some interpretation and evasion and that, in terms of its public face, may give the appearance of not being terribly serious.

Ironically enough, I think one of the primary examples of this are the United States economic sanctions against South Africa, whose effective date provisions, when you look at the full programme, are so complicated that I had to engage a graphic artist to construct a chart for my book to demonstrate to the reader at what point and under what circumstances various provisions came into play. A complication of that sort would not encourage very effective enforcement.

Nonetheless, I think Professor Lowenfeld's point is well taken. One must give some consideration to the case of someone who in good faith has a contract and suddenly finds it cut off. I think some attention to specifying what the consequences of the change in situation would be is probably a helpful thing.

Finally - in terms of the penalties, the bite of the model law - in my own experience, I have found that the most effective penalty is probably of the sort suggested by section 5 of the model law, namely, the seizure and confiscation provisions rather than penalties of the sort one finds in section 6, which has the actual penalties provision, for a variety of reasons. Criminal law concepts of intent are often difficult to prove and enforcers may be hesitant on that basis.

The beauty of seizure and confiscation is that it happens only on the strength of the facts and then one simply comes in and enforces that. I would, however, suggest that the possible addition of a section 5(c) mandating a forfeiture of the proceeds of any sale of any oil or petroleum products in violation of section 2. One reason for this - making this an explicit

consequence of violation - is that it will dramatically alter the calculation of risk by the potential seller who might also calculate the net risk of the transaction in terms of the likelihood of incurring a section 6 penalty against the relative certainty of receiving the sale proceeds.

Finally - just a technical point - in reaction to something that Professor Lowenfeld suggested. Admittedly, the precise terms of the penalties as defined and so forth would need to be adjusted within the context of each State's jurisdiction. But I would hesitate about including language which simply referenced over to the general felony law of the State for the following reason. I think you may be giving too much discretion to some State systems.

A concrete example, again from the United States experience, under the Comprehensive Anti-Apartheid Act, there are some penalties as high as $1 million. Elsewhere, in federal criminal law there are some penalties that are dwarfed to insignificance and yet both of those kinds of crimes might be felonies. If you leave it to a State with that kind of criminal system to decide which felony to use as the model, it may be that you end up with a $1,000 fine or it may be that you end up with a $1 million fine.

I think it is useful for this Group in moving forward a model law, at least to indicate in the draft the precise dimensions of the penalty. It seems to be that, if the Group were to quantify it, recognizing that this is a model law being put forward to States, it could then make clear the degree of seriousness with which it views violations of the prohibitions and approximate for States the degree of severity of the penalty that it expects or would hope to see in any implemented national law.

Briefly, then, just to conclude, I think this is obviously a very important undertaking as a model, whether or not it ends up being implemented by a few States or by many. I think it is a very important guide and a very important statement and it is also possibly a basis for measurement as Professor Lillich has suggested.

It concentrates the mind around a very specific approach to the problem and it gives one a basis for judging the performance of individual States. I take the point, which was alluded to before, that one must be careful of extraterritorial effects and indeed one might wonder what would happen if the model law began to be directly implemented by a number of States.

On the other hand, where the objective is important, it seems to me that the means must be appropriate to it. So I am not troubled by the notion of the broad extraterritorial reach

of this draft. Without it I think one invites a mockery. On the other hand, the extraterritorial effect certainly is, as we have seen in so many cases, a very provocative situation.

One way that the draft model law might alleviate some of this provocative element would be to include perhaps an exception from the extraterritorial effect in the following situation. One could adjust the reach of the statute to foreign-based subsidiaries and branches explicitly with a paragraph 7(c), that would exclude any such foreign *situs* as a branch of a subsidiary if the host State of that branch or subsidiary has itself adopted the model law and such branches and subsidiaries are subjected to the prohibitions of that model law provided, of course, that kind of relief would not be offered to any branch or subsidiary located in South Africa itself.

It seems to me that this then puts objecting States to their principles. If they are provoked by the broad extraterritorial application of such a law, then let them do what needs to be done to complete the net of the embargo. If they do not wish to undertake that on their own, then such a provision, suppose it is 7(c), would allow the project to go forward without their assistance.

Courtesy of the Centre against Apartheid